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January 21, 2000

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., TWB204
Washington, D.C. 20004

Re: ***Reply Comments of Hearst-Argyle Television, Inc.***

Dear Ms. Salas:

Transmitted herewith, on behalf of Hearst-Argyle Television, Inc. are an original and eleven (11) copies of ***Reply Comments of Hearst-Argyle Television, Inc.*** in the above referenced proceeding.

If any questions should arise during the course of your consideration of this matter, it is respectfully requested that you communicate with this office.

Very truly yours,

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.

Mark J. Prak
Counsel to Hearst-Argyle Television, Inc.

Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of the Satellite	)	
Home Viewer Improvement Act	)	CS Docket No. 99-363
of 1999	)	
	)	
Retransmission Consent Issues	)	

To: The Commission

REPLY COMMENTS
OF
HEARST-ARGYLE TELEVISION, INC.

Hearst-Argyle Television, Inc., by its attorneys, hereby files the following reply comments in response to the *Notice of Proposed Rule Making* ("*NPRM*"), FCC 99-406, released December 22, 1999 and the comments filed by various parties in the above-captioned proceeding. The *NPRM* seeks comment, among other things, on the implementation of the good-faith negotiation and exclusivity prohibitions contained in the Satellite Home Viewer Improvement Act of 1999 ("SHVIA").

Hearst-Argyle is a publicly-traded company that currently owns or manages 26 television stations and seven radio stations in geographically diverse markets. The company's television stations reach approximately 17.5% of U.S. television households, making it one of the two largest non-network owned television station groups in the United States, as well as one of the seven largest television groups overall measured by audience delivered.

Generally speaking, satellite carriers, their trade associations and other wireless MVPDs have urged, the Commission in their initial comments, to establish an elaborate regulatory scheme to control the course of retransmission consent negotiations. Hearst-Argyle respectfully urges the Commission to reject such an approach and allow satellite carriers and broadcasters to negotiate mutually acceptable retransmission consent agreements with minimal government oversight.

In support of its position, Hearst-Argyle states as follows.

I. The Commission Should Reject The Satellite Interests' Request To Create A Complex Regulatory Structure To Govern A Simple Business Negotiation.

Notwithstanding the straightforward language of the statute, the satellite interests have undertaken in this rulemaking to reargue policy choices considered and rejected by Congress in passing the SHVIA. SHVIA was enacted to facilitate the development of a competitive marketplace for the delivery of television broadcast signals to the American public. Consistent with Congress' intent, the Commission should not create a complex and overly regulatory system to govern the substantive terms of retransmission consent negotiations and agreements. There is no benefit to the public in creating a 1930's common carrier style regulatory scheme to govern the rates, terms and conditions upon which television stations provide retransmission consent to satellite carriers.

In their comments, the satellite industry players offer various "wish lists" of items they would like defined as evidence of "bad faith" negotiations. *See, e.g.*, DirecTV Comments, pp. 9-10; EchoStar Comments, pp. 12-13. But these "wish lists" are, when carefully considered, nothing more than an attempt to gain a strategic advantage in the negotiations. That is to say, if satellite carriers can persuade the government to place its thumb on the negotiating scales, and define the television broadcaster's negotiating positions as *per se* bad faith, then the satellite carriers obviously acquire

substantial negotiating leverage. Indeed, once such a common carrier style regulatory scheme is in place, all a satellite carrier need do is threaten to file a complaint with the FCC as a negotiating tactic to create leverage. The Commission should not allow its rules to manipulate the negotiation process.[1]

Evidence of this may be found in the comments of EchoStar. EchoStar suggests that the Commission define as "bad faith" anything other than agreement by a broadcaster to grant retransmission consent at no charge.[2] EchoStar's position — which it was unable to persuade Congress to adopt — is based on the faulty assertion that broadcasters have "generally" granted retransmission consent to cable operators "for free or at a very low cost."[3] This factually unsupported assertion is obviously false. In fact, most television stations, Hearst-Argyle's included, receive barter value, cash or a combination of cash and barter consideration in exchange for their retransmission consent rights. EchoStar then proceeds to argue that no negotiation is really necessary since cable operators obtain retransmission consent for "free" it should be *per se* bad faith for all broadcasters not to grant retransmission consent to EchoStar for "free." EchoStar cites a Copyright Arbitration Royalty Panel report suggesting that the copyright royalty rate for the right to

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[1] That members of the satellite industry have engaged in a pattern and practice of violating the laws governing retransmission of television signals and copyrights is beyond question. See, e.g., SHVIA, Joint Explanatory Report of the Committee of Conference, p. 7 (condemning "lawbreaking by satellite carriers"); ABC, Inc. v. PrimeTime 24, Joint Venture, 17 F.Supp 2d 467 (M.D.N.C. 1998) (pattern and practice violation found), aff'd 184 F.3d 348 (4th Cir. 1999); CBS, Inc. v. Prime Time 24 Joint Venture, 9 F. Supp. 2d 1333 (S.D. Fla. 1998).

[2] EchoStar Comments, p. 17.

[3] *Id.* at p. 15

carry local programs is zero.[4] EchoStar then concludes that the value of the right to retransmit and resell a local television station's signal is, likewise, zero.[5] If this were actually so, one might reasonably inquire of EchoStar just how it is that it is able to re-sell the signals of local television stations for $1.25 per month.[6] EchoStar's real world business practices demonstrate the marketplace value of the right to retransmit local television signals. A review of the comments in this proceeding makes clear that the goal of EchoStar and other MVPDs is to attempt to see if they may somehow continue to take something that belongs to someone else and re-sell it for a profit with the Commission's assistance. Now that Congress has created a retransmission consent scheme for satellite carriers to lawfully provide local signals, the satellite carriers are simply reaching for a regulatory advantage. The Commission should reject EchoStar's request as contrary to the SHVIA, logic and common sense.

It is axiomatic that the right to grant retransmission consent also comprehends the right to deny retransmission consent. An arm's-length negotiation can take place in good faith where the parties send authorized representatives to meet at reasonable times and dates at convenient locations. The Commission can most effectively and efficiently implement the SHVIA's good faith and exclusivity provisions by adopting a simple rule which does not attempt to place a regulatory thumb on the negotiating scale in favor of one party.

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[4] *Id.*

[5] EchoStar accomplishes this rhetorical sleight of hand by conflating two separate and legally distinct rights: (1) the copyright in the underlying programming; and (2) the right to retransmit the entire signal of the television station.

[6] EchoStar web site, <www.dishnetwork.com/programming/quickbak.htm>.

II. The Commission Would Demonstrate Infidelity To The Statute Were It To Attempt To Define Good Faith As Anything Other Than A Procedural Duty

As noted in the initial comments of the ABC, CBS, NBC and Fox Network Affiliates, there is no need for the Commission to adopt a "*per se*" or "totality of the circumstances" test to implement the "good faith" negotiation requirement of Section 325(b)(3)(C). The MVPD comments especially those of the satellite carriers are, not-surprisingly, devoid of any analysis of the actual language that Congress enacted in amended Section 325(b)(3)(C). The language of the amendment is as follows:

> [The Commission shall] until January 1, 2006, prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.

This language, as well as its legislative history, does *not* contain any broad grant of authority to the Commission to create an intrusive regulatory scheme to define "good faith," or to adopt a two-part test for "good faith" comparable to those in the labor law and interconnection agreement contexts, or to adopt a prospective list of *per se* violations. The only authority Congress granted is for the Commission to "revise" its regulations to take account of the fact that broadcasters would now be in a position to grant satellite carriers the right to retransmit their signals in their local markets. There is thus no statutory basis to support the contention that Congress intended to authorize the Commission to re-write or to expand in any substantive manner the "good faith" language contained in the statute itself. To implement the statute, the Commission should follow

its plain language.[7] The Commission may not treat the statute as an "empty vessel" into which it may pour policies that are at odds with those considered and rejected by Congress. That the SHVIA must be construed narrowly follows from three fundamental tenets of statutory construction: First, "Congress is understood to legislate against a background of common-law adjudicatory principles."[8] Second, "Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."[9] And lastly, when a requirement does derogate from the common law it "must be strictly construed, for no statute is to be construed as altering the common law, *farther than its words import.*"[10] It is a long-established and familiar principle of American law that there is no implied duty to negotiate an arm's-length contract in good faith.[11] Indeed, so well grounded is the notion of freedom of contract that neither the Uniform Commercial Code ("U.C.C.) nor the Restatement

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[7] *Cf.* Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, *First Report and Order*, FCC 93-178, 72 Rad. Reg. 2d (P&F) 649 (1993) at ¶ 10 (stating that the Commission "will follow the plain language of the statute by applying the general prohibition in Section 628(b) against 'unfair methods of competition' and 'unfair or deceptive acts or practices'").

[8] *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991).

[9] *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952).

[10] *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304 (1959) (internal quotation marks and citation omitted; emphasis added).

[11] *See e.g., Racine & Larmie, Ltd. v. California Dep't of Parks and Recreation*, 14 Cal Rptr. 2d 335, 339 (Ct. App. 1992); *Magna Bank v. Jameson*, 604 N.E. 2d 541, 544 (Ill. Ct. App. 1992); *Frutico, S.A. de C.V. v. Bankers Trust Co.*, 833 F. Supp. 288, 300 (S.D.N.Y. 1993). *See also* E. Allan Farnsworth, CONTRACTS § 3.26 (2d ed. 1990) (recognizing that any requirement to "negotiate in good faith" is a departure from core common law principles protecting the freedom of contract).

(Second) of Contracts imposes any good faith duty in the *negotiation* of a contract.[12] Therefore, when Congress imposed the duty to negotiate in good faith in Section 325, it acted against this well-established backdrop of freedom of contract. Because the statute does not *expressly* give the Commission the authority to derogate even further from the established common law principle of freedom of contract, the Commission is simply without the authority to intrude prospectively into the workings of the marketplace. The various comments of MVPDs, especially those of the satellite carriers, fail to recognize altogether these controlling legal principles. The MVPDs importune the Commission to act as if it may impose any legal rules it may choose. However, once the controlling legal principals are acknowledged—and respected—the Commission's task in this matter—to promulgate only implementing regulations—becomes very straightforward. A proposed rule which is true to the foregoing principles is contained in Exhibit A.

[12] *See* U.C.C. § 1-203; RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. C (stating that "[t]his section, like Uniform Commercial Code § 1-203, does not deal with good faith in the formation of a contract").

Conclusion

Hearst-Argyle urges the Commission to reject the entreaties of the satellite carriers and other MVPDs. There is no need to deviate from the plain meaning of the SHVIA to create a complicated regulatory regime for a simple business negotiation. Hearst-Argyle fully supports the comments and reply comments of the ABC, CBS, NBC and Fox Affiliates filed in this proceeding.

Respectfully submitted,

HEARST-ARGYLE TELEVISION, INC.

By: _____
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Its Attorney

January 21, 2000

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Exhibit A

Proposed Amendment to 47 C.F.R. § 76.64

Hearst-Argyle recommends that Section 76.64 be amended as follows in connection with Section IV of the Notice of Proposed Rule Making, FCC 99-406, released December 22, 1999, in CS Docket No. 99-363:

> (o) All parties to a retransmission consent negotiation shall bargain in good faith. This obligation shall be satisfied so long as (i) each party to the negotiation agrees to meet at reasonable times and locations, (ii) each party agrees to confer on the terms of an agreement, and (iii) no party refuses to deal outright. It shall not be a failure to negotiate in good faith if a television broadcast station that provides retransmission consent enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.
>
> (p) Subsections (m) and (o) above shall expire at midnight on December 31, 2005.